



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

April 11, 2003

Ms. Mia M. Martin
General Counsel
Richardson Independent School District
400 South Greenville Avenue
Richardson, Texas 75081-4198

OR2003-2445

Dear Ms. Martin:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 179222.

The Richardson Independent School District (the "District") received two requests for "copies of all vendor responses . . . to the Request for Proposals for the Richardson Independent School District Wide Area Network Fiber Proposal." You ask whether the requested information is excepted from disclosure under sections 552.101, 552.104, and 552.110 of the Government Code. Also, you indicate, and provide documentation showing, that the District has notified Mears/CPG, LLC ("Mears"), LB&L Cable, Inc. ("LB&L"), MasTec North America, Inc. ("MasTec"), Northern Line Layers ("Northern Line"), Housley Communications, Inc. ("Housley"), Worldbridge Broadband Services ("Worldbridge"), Red Simpson, Inc. ("Red Simpson"), Verizon Select Services, Inc. ("Verizon"), Future Telecom, Inc. ("Future Telecom"), and Capco Communications, Inc. ("Capco") to afford each entity an opportunity to supply objections to release of the submitted information. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). We have reviewed the representative sample of information you submitted and we have considered the exceptions you claim.¹

¹ We assume the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

Initially, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, LB&L, MasTec, Northern Line, Worldbridge, Red Simpson, Verizon, Future Telecom, and Capco have not submitted to this office reasons explaining why the District should not release their information. Therefore, these entities have provided us with no basis to conclude that they have a protected proprietary interest in any of the submitted information. *See* Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990).

The District asks about the applicability of section 552.101 of the Government Code, while Mears asserts this provision excepts certain information from public disclosure. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Neither the District nor Mears cite any law or judicial decision to support a claim under section 552.101. Therefore, the District may not withhold any of the submitted information under section 552.101 of the Government Code.

Next, we address the District's claim of section 552.104 of the Government Code, which states information is excepted from required public disclosure if release of the information would give advantage to a competitor or bidder. Gov't Code § 552.104. The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Moreover, section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. Open Records Decision No. 541 at 4 (1990). This office has long held that section 552.104 does not except information relating to competitive bidding situations once a contract is in effect. *See, e.g.,* Open Records Decision Nos. 541 (1990), 514 (1988), 306 (1982), 184 (1978), 75 (1975). In this case, you inform us the District has awarded the contract for which it issued the Request for Competitive Sealed Proposal ("RFCSP") for construction of a fiber optic WAN network. Accordingly, the District may not withhold the submitted information based on section 552.104 of the Government Code.

Finally, we address Housley's and Mears's assertions of section 552.110 to except certain information from disclosure. Section 552.110 protects: (1) trade secrets and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110. Section 552.110(a) protects the proprietary interests of private parties by excepting from

disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See* Gov't Code § 552.110(a). A "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business in that it is not simply information as to single or ephemeral events in the conduct of the business, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees.... A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

Restatement of Torts §757 cmt. b (1939); *see also* *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing this information; and
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Restatement of Torts §757 cmt. b (1939); *see also* Open Records Decision No. 232 (1979). This office must accept a claim that information subject to the Public Information Act (the "Act") is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. *See* Open Records Decision No. 552 (1990). However, we cannot conclude that section 552.110(a) applies unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. *See* Open Records Decision No. 402 (1983).

Section 552.110(b) protects "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]" Gov't Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

Housley states it has no objections to the release of sections 2, 3, 5, and 5 of its proposal. However, Housley claims section 552.110(b) excepts some of the information contained in section 1. Specifically, Housley objects to the public disclosure of information in Schedule 3, titled Contractor's Financial Statement, which includes Housley's balance sheet, liabilities and stockholder's equity, and income statement. Housley informs us it is a privately held company that strictly limits access to its financial statements to four people within the corporation - the president, executive vice president, controller, and accounting supervisor. Housley explains competitors could use the financial information it seeks to withhold to ascertain its cash-flow position, which ultimately determines a company's ability to expand operations and obtain new customers. According to Housley, these financial statements reveal not only the overall profitability of Housley, but also they detail specific resource allocations, revenue centers, and programs. Based on Housley's arguments and our review of the submitted information, we conclude that Housley has established the financial statements contained in Schedule 3 constitute confidential commercial and financial information. Thus, the District must withhold the information we have marked under section 552.110(b) of the Government Code.

To establish the applicability of section 552.110, Mears states certain information on specified pages is "proprietary in nature" and "disclosure of the information would cause Mears competitive and financial harm in connection with preparing proposals on future projects." Mears makes only this conclusory and generalized allegation to justify its claim for nondisclosure of some of its information. Therefore, we find Mears has not met its burden of making a *prima facie* case as required by section 552.110(a). *See* Gov't Code § 552.110(a). Further, Mears has not made a specific factual or evidentiary showing that

release of the information would result in substantial competitive injury. *See* Gov't Code § 552.110(b); *see also Nat'l Parks*, 498 F.2d. 765; ORD 661. Consequently, we conclude the District may not withhold Mears's information under section 552.110 of the Government Code.

Finally, the submitted information contains an e-mail address subject to section 552.137 of the Government Code. Specifically, section 552.137 states the following:

(a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137. This provision makes certain e-mail addresses confidential. *See* Gov't Code § 552.137. You do not inform us that the member of the public has affirmatively consented to the release of the e-mail address contained in the submitted materials. Therefore, the District must withhold the e-mail address of the member of the public, which we have marked, under section 552.137.

In summary, the District must release the proposals submitted by LB&L, MasTec, Northern Line, Worldbridge, Red Simpson, Verizon, Future Telecom, and Capco as these entities have not submitted reasons for withholding information as permitted by section 552.305 of the Government Code. Further, the District must release the proposal submitted by Mears, in its entirety, as Mears did not sufficiently establish the applicability of section 552.101 or 552.110 of the Government Code. The District must withhold the information submitted by Housley, which we have marked, under section 552.110(b) of the Government Code. Lastly, the District must redact the e-mail address we have marked under section 552.137 of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.*

§ 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

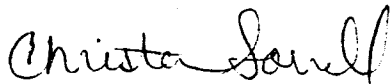
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Christen Sorrell
Assistant Attorney General
Open Records Division

CHS/seg

Ref: ID# 179222

Enc: Submitted documents

c: Mr. Kyle F. Capps
CEO
Capco Communications, Inc.
P.O. Box 91087
Austin, Texas 78709-1087
(w/o enclosures)

Mr. Larry Davis
President
LB&L Cable, Inc.
1501 Southeast 4th Street, Suite D
Moore, Oklahoma 73160
(w/o enclosures)

Mr. James A. Carter
Carter & Boyd, P.C.
515 West Harris, Suite 100
San Angelo, Texas 76903
(w/o enclosures)

Ms. Catherine Schafer
Manager, Contracts
Mears/CPG, L.L.C.
P.O. Box 66
Rosebush, Michigan 48878
(w/o enclosures)

Mr. Grover Jones
Corporate Account Manager
Verizon
500 East Carpenter Freeway
Irving, Texas 75062
(w/o enclosures)

Mr. Keith S. Smith
Division Manager
Red Simpson, Inc.
P.O. Box 12120
Alexandria, Virginia 71315-2120
(w/o enclosures)

Mr. Paul Janson
President and CEO
Worldbridge
141 Union Boulevard, Suite 475
Lakewood, Colorado 80228
(w/o enclosures)

Mr. Don Dodge
Executive Vice President
Northern Line Layers
6780 Trade Center Avenue
Billings, Montana 59101
(w/o enclosures)

Mr. D. Holland
Operations Manager
MasTec North America, Inc.
4747 Irving Boulevard, Suite 221
Dallas, Texas 75247
(w/o enclosures)

Mr. David Helmers
Operations Manager
Future Telecom
P.O. Box 852728
Mesquite, Texas 75185
(w/o enclosures)